

SERVICE DATE – MAY 26, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35991

THE ATLANTA DEVELOPMENT AUTHORITY D/B/A INVEST ATLANTA AND
ATLANTA BELTLINE, INC.—VERIFIED PETITION FOR A DECLARATORY ORDER

Digest:¹ This decision denies a petition to reconsider a Board decision served on December 15, 2016, because the petitioners have failed to present new evidence, demonstrate substantially changed circumstances, or show material error.

Decided: May 24, 2017

The Flagler Owners, individuals who own or reside in homes adjacent to the northern segment of the rail line at issue in this case,² request that the Board reconsider its December 15, 2016 decision (December Decision) addressing the petition for declaratory order filed by the Atlanta Development Authority d/b/a Invest Atlanta (Authority) and Atlanta BeltLine, Inc. (collectively, Atlanta Parties). For the reasons discussed below, the Board will deny the Flagler Owners' petition for reconsideration.

BACKGROUND

The Atlanta Parties are the public redevelopment and implementation agents for the Atlanta BeltLine Project (Project), an urban redevelopment effort in Atlanta involving numerous current or former rail segments. (Pet. for Declaratory Order 2.) The Atlanta Parties filed the underlying petition for declaratory order requesting that the Board confirm the regulatory status

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

² The Flagler Owners are Cynthia Vick Ragan, Gordon B. Ragan, Jr., Elizabeth A. Albert, Michael Loving, Dawn Smith, Roderick Smith, Jason Godwin, Steven R. Green, Stacey E. Clay, Sandy Flores, Christopher Draper, Dennis Sabo, Jr., Laura M. Shepard, Angela Heredia, Hannibal Heredia, Patricia S. Jones, Donna M. Fitzmaurice, Patrick J. Fitzmaurice, Samantha C. Bontrager, Dewayne M. Bontrager, Molly Taylor, Josh B. Taylor, Thomas R. Markovic, Megan Cochard, Matthew R. Cochard, Amanda K. Sapra, Neil K. Sapra, Margaret N. Corbett, Nicolas Albano, Eric Bymaster, Fulton D. Lewis, III, S. Neil Rhoney, Tom Philpot, Anna L. Lentz, and Kurt Lentz.

of one of the rail segments involved in the Project and settle certain issues with respect to transfers of the segment's underlying real estate.

The Line. According to the Atlanta Parties, the rail line at issue, the Northeast Quadrant (the Line), is approximately 4.14 miles long and is located in Fulton County, Ga., between mileposts 636.56 and 632.42. (Atlanta Parties Supp. 5, June 15, 2016.) The Line consists of two segments on either side of the Montgomery Ferry Road Bridge, which is at milepost 632.84. (*Id.* at 6.) The portion south of the bridge (the Southern Segment) is approximately 3.72 miles long and extends from the bridge to the southernmost point on the Line at milepost 636.56. (*Id.*) The portion north of the bridge (the Northern Segment) is approximately 0.42 miles long and extends to the northernmost point on the Line at milepost 632.42. (*Id.*) The Northern Segment runs adjacent to the rear of various residential properties along Flagler Avenue where the Flagler Owners own property or reside. (Atlanta Parties Supp., Ex. C, June 15, 2016; Flagler Owners Reply, Ex. B.)

Transfers of the Underlying Real Estate of Line. The Line was owned by Norfolk Southern Railway Company (NSR) until 2004. (Pet. for Declaratory Order 3.) The underlying real estate was transferred to the Authority through three transactions, though NSR retained an easement. (*Id.* at 3-4.) In the first of these transactions, NSR conveyed the real estate underlying the Line to six non-carrier entities collectively referred to as the Mason Entities. The Mason Entities subsequently conveyed the real estate underlying the Line to NE Corridor Partners, LLC, which then conveyed it to the Authority. These transactions were accomplished by executing various deeds, deeds of correction, and purchase and sale agreements (the Conveying Documents and Transaction Documents). These transactions and the Conveying Documents and Transaction Documents are discussed in detail in the December Decision.

Petition for Declaratory Order. On January 8, 2016, the Atlanta Parties filed the underlying petition for declaratory order, asking the Board to make three findings: (1) that the acquisition of the underlying real estate from NSR by the Mason Entities did not require Board approval pursuant to Maine, Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad (State of Maine), 8 I.C.C.2d 835 (1991), and therefore the absence of Board approval is not a basis for voiding that transaction; (2) that because the Mason Entities' acquisition of the real estate underlying the Line did not require Board approval, the subsequent acquisitions of that real estate from the Mason Entities (including the acquisition by the Authority) did not require Board approval, and therefore the absence of Board approval is not a basis for voiding those transactions; and (3) that because NSR abandoned the Line south of the Montgomery Ferry Road Bridge (the Southern Segment), the Board has no continuing jurisdiction over that portion of the Line, and therefore the Board need not approve any future conveyance of real estate underlying that portion of the Line.

On January 27, 2016, the Flagler Owners filed in opposition to the Atlanta Parties' petition. The Flagler Owners argued that the conveyance of the Line from NSR to the Mason Entities did not comport with State of Maine doctrine and was subject to Board approval requirements at 49 U.S.C. § 10901(a)(4). (Flagler Owners Reply 8.) The Flagler Owners argued that because no § 10901 authority was sought, the Board should deny the Atlanta Parties'

petition and instead issue a declaratory order finding that the conveyance of the Line from NSR to the Mason Entities is void. (Id. at 4.)

December Decision. In determining whether the conveyances of the underlying real estate from NSR to the Mason Entities (and then to the subsequent owners) met the State of Maine requirements, the key question considered by the Board was whether the Conveying Documents and Transaction Documents gave the Mason Entities the ability to prevent NSR from meeting its common carrier obligations on the Line. December Decision, slip op. at 8, citing N.J. Transit Corp.—Acquis. Exemption—Norfolk S. Ry., FD 35638, slip op. at 3 (STB served Mar. 27, 2013); Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 8 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807 (D.C. Cir. 2011).

The Board found that the conveyance of the Northern Segment from NSR to the Mason Entities comported with State of Maine precedent because NSR retained a permanent, exclusive easement and sufficient control to carry out its common carrier duties over that segment. Consequently, the Board found that the subsequent conveyances of the Northern Segment real estate leading to the purchase by the Authority also did not require Board authority, as those conveyances were subject to the same terms and conditions.

However, the Board found that there was a critical difference in the documents pertaining to the Southern Segment. Specifically, the Conveying Documents and Transaction Documents for that segment included a condition stating that NSR shall not negotiate the use of the easement area with any party without the prior written consent of the Mason Entities. (Pet. for Declaratory Order Ex. B at 2.) The Board concluded that this condition did not comport with the Board's State of Maine precedent and that, therefore, the sale of the Southern Segment from NSR to the Mason Entities required Board authority. This and other conditions were also included in the subsequent conveyances, including the conveyance to the Authority. Accordingly, the Board found that the subsequent conveyances of the Southern Segment also did not fall within the State of Maine precedent.

However, because the portion of the Southern Segment between milepost 633.10 and milepost 636.56 had been fully abandoned with the Authority's active support,³ the Board found that it was no longer a rail line under the Board's jurisdiction. Therefore, the Board found that the question of the Authority's ability to interfere with NSR's common carrier obligation on that

³ In December 2008, pursuant to 49 C.F.R. § 1152.50, NSR filed a Verified Notice of Exemption to abandon most of the Southern Segment and an additional 0.84 miles of line to the south, from milepost 633.10 to milepost 637.40. Norfolk S. Ry.—Aban. Exemption—in Fulton Cty., Ga., AB 290 (Sub-No. 210X) (STB served Dec. 28, 2008). The Authority participated in the proceeding and actively supported the abandonment as necessary for implementing the Project. NSR timely filed a notice of consummation of abandonment on October 22, 2010. Norfolk S. Ry.—Aban. Exemption—in Fulton Cty., Ga., AB 290 (Sub-No. 210X) (filed Oct. 22, 2010).

portion of the Southern Segment was moot. Accordingly, the Board did not require the parties to either seek Board authorization or modify the conveyance transactions pertaining to that portion of the Southern Segment to comport with State of Maine after the fact. However, given that a small portion of the Southern Segment (between milepost 632.84 and milepost 633.10) had not been abandoned, the Board ordered that, within 30 days of the December Decision, the Authority must either file for after-the-fact acquisition authority or file a copy of amended documents removing the provisions that were inconsistent with State of Maine.

Petition for Reconsideration. The Flagler Owners argue that, by reaching different conclusions with respect to the Northern Segment and the Southern Segment, the Board incorrectly interpreted the term “railroad line” and ignored the fact that NSR conveyed the entirety of the Line in a single transaction. (Pet. for Recon. 5-6.) As such, the Flagler Owners request that the Board review the conveyance in question “under the interpretation that the term ‘railroad line’ refers to the Northeast Quadrant Line as a whole and not as the Northern Segment and Southern Segment individually.” (*Id.* at 7.) Upon reconsideration, the Flagler Owners argue that the Board should void the entire conveyance of the Line from NSR to the Mason Entities, as the Board did not approve that conveyance as required under 49 U.S.C. § 10901. (*Id.*)

In response, the Atlanta Parties argue that the Flagler Owners have not met their burden for reconsideration because they have alleged no new facts, changed circumstances, or material error by the Board. (Atlanta Parties Reply 3.) The Atlanta Parties further argue that the Board has no authority to determine whether the transactions effecting the transfers of the fee interest associated with the Line were invalid because that is an issue of state law. (*Id.* at 4.)

Subsequently, on February 16, 2017, the Atlanta Parties filed a supplement to the petition for declaratory order, including a copy of a Deed of Correction, dated February 9, 2017, between NSR and the Authority. The Atlanta Parties note that, in accordance with the December Decision, they have mutually agreed with NSR to remove the limitations on NSR’s ability to provide common carrier service over the Southern Segment, and that because of that agreement, the Authority’s and NSR’s rights and obligations over the Southern Segment are now the same as those over the Northern Segment. (Third Supp. 2.) The Atlanta Parties request that the Board grant their petition for declaratory order with respect to the portion of the Southern Segment that NSR has not abandoned, stating that the Authority’s ownership now comports with State and Maine and thus does not require the Board’s approval. (*Id.*)

DISCUSSION AND CONCLUSIONS

A party may seek reconsideration of a Board decision by submitting a timely petition that (1) presents new evidence or substantially changed circumstances that would materially affect the case, or (2) demonstrates material error in the prior decision. 49 U.S.C. § 1322(c); 49 C.F.R. § 1115.3; see also W. Fuels Ass’n v. BNSF Ry., NOR 42088, slip op. at 2 (STB served Feb. 29, 2008). In a petition alleging material error, a party must do more than simply make a general allegation; it must substantiate its claim of material error. See Can. Pac. Ry.—Control—Dakota, Minn. & E. R.R., FD 35081, slip op. at 4 (STB served May 7, 2009) (denying petition for reconsideration where the petitioner did not substantiate the claim of material error and the Board found none). If a party has presented no new evidence, changed circumstances, or

material error that “would mandate a different result,” then the Board will not grant reconsideration. See Montezuma Grain v. STB, 339 F.3d 535, 531-42 (7th Cir. 2003); Or. Int’l Port of Coos Bay—Feeder Line Application—Coos Bay Line of Cent. Or. & Pac. R.R., FD 35160, slip op. at 2 (STB served Mar. 12, 2009).

Here, the Flagler Owners argue that NSR “conveyed [the Line] in its entirety, and subjected the entire conveyance to the Board’s approval. Accordingly, the Decision’s interpretation of ‘railroad line’ inappropriately apportioned the conveyance of [the Line] into the Northern and Southern Segments.” (Pet. for Recon. 6-7.) The Flagler Owners further argue that by reaching “distinct legal conclusions concerning the Northern Segment and Southern Segment” the Board “effectively altered” NSR’s conveyance of the Line in its entirety, leaving the Flagler Owners without a remedy at law. (*Id.* at 7.) Although the Flagler Owners do not specifically address the reconsideration criteria, the Board reads their petition as raising a claim of material error.

The Board finds no material error because the Flagler Owners have not demonstrated that it was improper for the Board to make different findings with respect to the Northern and Southern Segments. In other words, the fact that the Line was conveyed in its entirety as part of a single transaction under state law does not mean that the facts and circumstances relevant to the Line’s federal regulatory status are the same for the entirety of the Line. As the Board explained in the December Decision, certain provisions of the Conveying Documents and Transaction Documents treat the Southern Segment and Northern Segment differently in a way that affects the regulatory posture of the two segments, such that Board authorization was required for conveying the Southern Segment but not the Northern Segment. Contrary to the Flagler Owners’ claim, the Board’s December Decision discussing the regulatory status of the Line did not “effectively alter[.]” the transaction from a single conveyance of the entire Line to two individual conveyances under state law. (Pet. for Recon. 7.) In conducting two separate analyses, the Board did not (and did not purport to) change the transaction, which, as the Board clearly understood, see December Decision at 2-3, involved the conveyance of the entire Line.

Furthermore, the Flagler Owners allege no error in the Board’s State of Maine analysis or the alternative remedies prescribed by the Board in the December Decision. As discussed above, the remedies addressed the provisions pertaining to the Southern Segment that were inconsistent with State of Maine by requiring the Authority to either file for after-the-fact acquisition authority or file a copy of amended documents removing those provisions. Either remedy would satisfy the Board’s regulatory requirements, and those requirements are distinct from the Flagler Owners’ remedies under state law regarding the sale of the Line. The Flagler Owners’ claim that addressing the Line in segments somehow affects their remedy at law is without merit. Even if the Board were to have analyzed the Line as a whole rather than in segments, the Flagler Owners have not shown how such an analysis would have resulted in a different outcome or different prescribed remedies. Accordingly, we find no error in the December Decision and will deny the Flagler Owners’ petition for reconsideration.

Finally, in response to the Atlanta Parties’ February 16, 2017 supplement to the petition for declaratory order, the Board finds that, under the Deed of Correction filed with that supplement, the easement retained by NSR over the Southern Segment is now identical to that

retained by NSR over the Northern Segment. As such, the Board finds that NSR possesses a permanent, exclusive easement conferring on NSR sufficient control to carry out its common carrier obligations over the entire Line, in accordance with State of Maine. Therefore, no after-the-fact Board authority is required for the conveyance of the Line.

It is ordered:

1. The Flagler Owners' petition for reconsideration of the December Decision is denied.
2. The Atlanta Parties' request that the Board find that no authority is required for conveyance of Southern Segment is granted to the extent discussed above.
3. This decision is effective on its date of service.

By the Board, Board Members Begeman, Elliott, and Miller.